INDEX.

	Page.
STATEMENT	1
THE FACTS	3
ARGUMENT:	
By the act of 1912 the Secretary of War was authorized to purchase this property	10
The acquisition of the property having been authorized by statute, the Secretary of War had power, under the act of August 1, 1888, c. 728, 25 Stat. 357, to acquire the property by condemnation proceedings	11
The history of the act of 1888 shows that Congress intended that full effect should be given to its sweeping terms	13
The naming of a specific price at which the Secretary of War was authorized to procure the property did not preclude condemnation proceedings	18
Congress has simply said that the Secretary of War may procure the property at not more than a specified sum, or, in the alternative, may submit the question of the value of the property to judicial determination	19

AUTHORITIES.

Shoemaker v. *United States*, 147 U. S. 282	20
United States v. *Beatty*, 198 Fed. 284	12
United States v. *Beatty*, 203 Fed. 620	12
United States v. *Graham & Irvine*, 250 Fed. 499	12
Act of August 1, 1888, c. 728, 25 Stat. 357	2, 11
Act of March 2, 1907, c. 2509, 34 Stat. 1089	3
Act of July 25, 1912, c. 253, 37 Stat. 201, 212	3, 10
19 Cong. Rec., part 2, p. 1387	13
19 Cong. Rec., part 7, p. 6401	13
19 Cong. Rec., part 7, p. 6505	13
House Document No. 610, Sixty-third Congress, second session	3
Revised Civil Code of Louisiana, Articles 2626–2641	2

In the Supreme Court of the United States

OCTOBER TERM, 1922.

ALBERT HANSON LUMBER COMPANY Ltd., plaintiff in error,
v.
THE UNITED STATES OF AMERICA.
No. 300.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The Government negotiated with the plaintiff in error, hereinafter called the company, for the purchase of a canal and adjacent land from the company. The canal is four and one-tenth (4.1) miles long and is situated in St. Mary Parish, Louisiana. The Government proposed to widen this canal and open it to public use. There was complete agreement between the parties as to the amount of property to be taken and the price to be paid for it. The only hitch came, finally, through a lack of certainty on the part of the company as to its title to a portion of the property, and, while the Government was fully

satisfied that the company had a good title to that portion, the company required formal though amicable condemnation proceedings in order to settle that question of title.

Before further action was taken the company tried to obtain certain rights of way near the canal, the obtaining of which depended upon a special local election, and declared that unless those rights of way were granted it would resist the condemnation. The results of the election were adverse to the company.

The present proceedings were then started. The company resisted condemnation upon the ground that it was not authorized by statute.

The case was tried in the District Court before a special jury of property owners of the vicinity of the canal in the manner provided by law. (Act of August 1, 1888, c. 728, sec. 2, 25 Stat. 357; Rev. Civ. Code of La., Articles 2626–2641.) The court ruled that the condemnation was authorized. Evidence as to value was produced by both sides and a verdict given for $65,000, the same amount as that upon which both sides in their negotiations had agreed.

On error, the Circuit Court of Appeals ruled that the condemnation was unauthorized and reversed the judgment. The attention of that court was then called to the Act of August 1, 1888, c. 728, 25 Stat. 357. The Court granted a rehearing, and decided that that Act authorized the condemnation, that the charge of the District Court was correct, and that

there was evidence to support the finding. It affirmed the judgment of the District Court.

Thereupon the company brought error to this Court.

THE FACTS.

This canal, known as the Hanson Canal, is a link of a great intracoastal canal projected by the Government, extending from Boston, Massachusetts, to the Rio Grande. (Act of July 25, 1912, c. 253, 37 Stat. 201, 212; Act of March 2, 1907, c. 2509, 34 Stat. 1089; House Document No. 610, 63rd Congress, Second Session.)

By the Act of 1912, *supra*, Congress authorized the Secretary of War to purchase this identical property for $65,000, and in specific cognizance of this Act the board of directors of the company passed a resolution authorizing its vice president to convey this property to the United States for the sum of $65,000 (R. 48, 49).

The resolution read as follows:

> Whereas by an Act of Congress approved March 2nd, 1907, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," provision was made for improving inland waterway channel from Bayou Teche to Mermentau, Louisiana, and whereas Congress, by act approved July 25th, 1912, provided as follows: "Improving waterway from Frankline to Mermentau, Louisiana; the Secretary

of War is hereby authorized to purchase for use as a part of said waterway the so-called Hanson Canal, in accordance with the recommendation made by the chief of engineers at a cost not to exceed sixty-five thousand dollars to be paid out of funds heretofore appropriated for this project;" *and whereas*

And whereas the Hanson Canal, which is owned by the Albert Hanson Lumber Company, extends through that portion of the route of said inland waterway hereafter described;

And whereas it is necessary for the United States to have and own a right of way three hundred feet in width in order to improve and enlarge said canal and make the same a part of the said Inland Waterway; *and*

And whereas the United States Government has proposed and agreed to purchase the said Hanson Canal for $65,000.00 from the Albert Hanson Lumber Company, Limited, including a 300 feet right of way and all locks and other constructions, for the improvement of said canal, and also all other constructions and encumbrances located on said right of way, except Morgan's Louisiana & Texas Railroad & Steamship Company railway bridge, the Iberia, St. Mary & Eastern Railway Company railway bridge, and one highway bridge;

Now, therefore, upon the payment of said sum of $65,000, as compensation for the said canal and locks and other constructions therein, and as the prices and consideration

for the necessary three hundred feet right of way, T. Cheney Lawless, Vice President of the Albert Hanson Lumber Company, being the chief executive officer of this corporation since the death of its president, is hereby authorized and empowered to grant, convey, donate, transfer, assign and set over, in the name and on behalf of the Albert Hanson Lumber Company, to and unto the United States of America and its assigns, all of the property designated and described as [here follows the description of the property].

Be it further resolved that the locks constructed in said Hanson Canal and the lock gates and all appurtenances incidental thereto, and all other real property located on the right of way of 300 feet width, except the M. L. & T. R. R. & S. S. Company railway bridge, the Iberia, St. Mary & Eastern Railway bridge, and one highway bridge, shall form part of the grant and become the property of the United States.

Be it further resolved that until the United States shall make actual payment and take actual possession of the said canal and right of way, the grantor, the Albert Hanson Lumber Company, Limited, shall have and retain the right to control, occupy, and use any and all portions of the above-described strip of land 300 feet wide, and keep trespassers off of it.

Be it further resolved that the grantor, the Albert Hanson Lumber Company, Limited, shall have and retain the right to remove all of

the trees and timber growing on or being on the banks of the said canal on the above described strip of land 300 feet in width, for a period of six months from the date of the actual payment and possession by the United States, provided the removal of such trees and timber is not required by the United States before the expiration of said six months, and provided further that upon the expiration of the said six months the timber still remaining shall belong to the United States.

Be it further resolved that the grantor, the Albert Hanson Lumber Company, Limited, and its assigns, shall always have and enjoy the free access, ingress, and egress to and from the said Hanson Canal, through the lateral canals now constructed and used by the Albert Hanson Lumber Company, Limited, in its timber operations and lumber business and for all such commercial purposes as the said lateral canals may be used for hereafter, even after the said Hanson Canal shall have been converted into a public inland waterway, provided said use of the canal is not contrary to or different from that of public navigable highways, and provided said use shall be under such regulations as may be prescribed by the Secretary of War.

Considerable time was spent by the Government in examination of title. Then, on April 14, 1919, it submitted a warranty deed to the company for signature. (R. 52.) Two days later the company declined to sign the deed because it was in doubt as to the validity of its title to a portion of the land.

George J. Bentz, a former owner of the portion, had left a minor posthumous child, Georgia Bentz, and the company was in doubt as to whether her interest had been legally divested. If it conveyed this portion under warranty deed it might be liable to the Government as warrantor. For this reason the company required a formal condemnation proceeding to which the minor should be made a party, so that her rights might be determined definitely. (R. 4, 51, 98, 99, 111, 116, 119.)

The Government therefore decided to condemn the property.

In the meanwhile the company was endeavoring to acquire certain rights of way in the neighborhood of the canal. The granting of these rights of way depended upon the result of a special local election. At this election the citizens refused to grant to the company the additional rights of way. Because of this defeat in the election the company has fought the present proceedings. (R. 115–120.)

Emmet Alpha, attorney for the company, thus testified (R. 118, 119):

> Q. Now up to that time there hadn't been any serious discussion about all these matters about which the evidence has been offered during this trial, about the length of tows, the time it takes to tow logs through the canal, the tide water and things, that had not been discussed at any time, had it?
>
> A. No, sir.

Q. And it was only after that special election went against the Hanson interests and you concluded to resist to the limit of your powers that the defense was made which you are now making?

A. What do you mean by defense?

Q. Well, I mean that these matters were brought out—the original complaint as indicated by your letter—and I think it is testified to by you—was that the Government, in order to divest the possible interest of this posthumous child, Miss Bentz, would have to bring a condemnation suit; that was the original position?

A. Yes, sir.

Q. That was practically acquiesced in by both sides, wasn't it?

A. Yes, sir.

Q. And up to the result of this election, there was no intention to make any fight, and, as your letter indicated, leave the question to be decided who should receive the proceeds?

A. Yes, sir.

Q. Now these other matters of defense, I say, were not discussed even until the election was held?

A. They were discussed only after that election, to the best of my recollection.

See also letter from Emmet Alpha, attorney for the company, on page 116 of the Record.

The present proceedings were instituted on June 10, 1920.

The essential question is as to the statutory authority to condemn the property; but the case was not fought solely upon that ground.

While the company repeatedly declared its willingness to convey the property to the Government for $65,000 (see the resolution adopted by its board of directors, p. 3, *supra*, and also R. 98, 99, 102, 103), the same amount which was afterwards awarded by the special jury of property owners of the vicinity of the canal, it claimed at the trial that the property possessed a higher value.

The company uses the canal simply as a highway on which it hauls its own logs and lumber. The Government is taking over the canal in order to widen it. There are approximately $51,000 immediately available for that purpose (R. 151, 152, 100); and the Engineer's office wishes to improve the canal immediately. (R. 152.) While the company will lose the right to the exclusive use of the canal, the canal will be widened to such an extent as to meet all the needs of the company, as well as those of the general public, and the company will be reimbursed for the original cost of the canal. (R. 102, 103.)

The engineer for the company admitted that the alleged damages to the company would be practically done away with by the widening of the canal. (R. 79.) It is also in evidence that it is feasible to institute regulations which will permit ample use of the canal by the company as well as by the general public. (R. 152, 164.)

The terms of the resolution of the board of directors of the company authorizing its vice president to convey the property to the United States for $65,000 have already been set forth (p. 3, *supra*). They do not show that the company then attached conditions to the proposed conveyance inconsistent with the rights which the Government will exercise after condemnation.

As the Circuit Court of Appeals decided—

> The charge of the Court properly submitted to the jury the finding of the value of the property and there was evidence to support the finding.

ARGUMENT.

By the Act of 1912 the Secretary of War was authorized to purchase this property.

The Act of July 25, 1912, c. 253, 37 Stat. 201, 212, reads:

> Improving waterway from Franklin to Mermentau, Louisiana:
>
> The Secretary of War is hereby authorized to purchase, for use as a part of said waterway, the so-called Hanson Canal, in accordance with the recommendation made by the Chief of Engineers, at a cost not to exceed sixty-five thousand dollars, to be paid out of funds heretofore appropriated for this project.

It may be freely conceded *arguendo* that this Act alone would not authorize the condemnation of the property. But the proceeding is based upon this Act combined with the Act of August 1, 1888, which

was intended by Congress to meet just such cases as the one now before the Court.

The acquisition of the property having been authorized by statute the Secretary of War had power, under the Act of August 1, 1888, c. 728, 25 Stat. 357, to acquire the property by condemnation proceedings.

That Act provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.
>
> SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under

> the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

Under this Act the power to condemn is expressly conferred in every case where purchase has been authorized and purchase is impracticable; and there is nothing in the legislation in regard to the canal which shows that Congress intended that the general power of condemnation under the Act of 1888 should be suspended in this instance.

In *United States* v. *Beatty*, 198 Fed. 284, construing an appropriation "for the purchase of land" only, with no reference to condemnation in the text of the act, the Court said (p. 287):

> The first section of the Act of 1888 makes further discussion (of the meaning of the word "purchase") unnecessary. The very purpose of that section was to authorize condemnation whenever, theretofore or thereafter, an act of Congress authorized land to be "procured" for public use. Surely no broader word than "procure" could have been used.

The Court was not overruled on this point in 203 Fed. 620.

In *United States* v. *Graham & Irvine*, 250 Fed. 499, a case involving condemnation under the Weeks Forestry Law, the text of which contains no reference to condemnation, the Court said (p. 502):

It must be assumed that in enacting the act of 1911 Congress had in mind the act of 1888. Sutherland, Stat. Constr. §333; 36 Cyc. 1146. *In view of the act of 1888 it was quite unnecessary to use* in the act of 1911 *words expressly stating an intent to permit acquisition of lands by condemnation.*

The history of the Act of 1888 shows that Congress intended that full effect should be given to its sweeping terms.

When the bill upon which the Act of 1888 was based passed the House of Representatives (Feb. 21, 1888, 19 Cong. Rec., part 2, p. 1387) it was much narrower in its scope than the present act. The Senate, however, on July 17, adopted amendments which greatly enlarged the effect of the proposed legislation; and the House of Representatives concurred in those amendments two days later without debate (19 Cong. Rec., part 7, p. 6505).

The action of the Senate, and the accompanying discussion, are reported in 19 Cong. Rec., part 7, p. 6401, as follows:

SITES OF PUBLIC BUILDINGS, ETC.

Mr. SPOONER. I am instructed by the Committee on Public Buildings and Grounds to report favorably, with amendments, the bill (H. R. 6153) to authorize condemnation of land for sites of public buildings, and I ask unanimous consent that the bill may be considered at this time.

Mr. COCKRELL. Let it be read for information.

The PRESIDENT *pro tempore*. The bill will be read at length for information, subject to objection.

The Chief Clerk read the bill; and by unanimous consent the Senate, as in Committee of the Whole, proceeded to its consideration.

The PRESIDENT *pro tempore*. The bill having been read at length, a further reading will be waived, if there be no objection. The amendments of the committee will be stated.

The first amendment of the Committee on Public Buildings and Grounds was, after the word "Treasury," in line 3, to insert "or any other officer of the Government;" in line 4, after the word "procure," to strike out "a site" and insert "real estate;" in line 5, after the word "building," to insert the word "or;" in the same line, after the word "for," to insert "other;" in the same line, to strike out the word "Government" and insert "public;" in line 10, to strike out the word "site" and insert "real estate;" and in line 14, after the word "act," to insert the words "or such other officer;" so as to read:

"That in every case in which the Secretary of the Treasury, or any other officer of the Government, has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the

district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

The amendment was agreed to.

Mr. MANDERSON. I understand that the bill in its original text simply provides for the condemnation of property by the Secretary of the Treasury that is to be used for court-houses, post-offices, etc.

The PRESIDENT *pro tempore*. Does the Senator from Nebraska desire to interfere with action on the amendments of the committee?

Mr. MANDERSON. No, sir; but simply to ask as to their character. It certainly would be desirable that the provisions of the bill should extend to other Departments, so that in the event that land may be taken for fortifications or for military posts condemnation as to such lands may also be had. I should like to ask the Senator from Wisconsin whether these amendments have that in view.

Mr. SPOONER. The Senator from Nebraska is correct in his statement that the bill as it came from the House confers the right of condemnation simply for the purpose of acquiring lands for public buildings, and is confined to the Secretary of the Treasury. The amendments

read thus far proposed by the Committee on Public Lands extend the scope of the bill so as to bring any public officer within its provisions who is authorized by law to acquire property for any public use. It will embrace fortifications or any public use legally justifying the exercise of the power of eminent domain.

The next amendment, which will be read at the desk, is one which simply provides that the proceedings in the Federal courts shall conform, as is now the law as to actions at law generally throughout the country, to the practice and proceedings and methods in similar actions in the courts of the States for the time being within which the Federal court is located.

Mr. McPHERSON. I should like to ask the Senator who has charge of this bill a question for information. We have in the State of New Jersey two cases, I think, where it seems there was an omission in passing the bills in Congress to give the power of condemnation because it was not deemed necessary. It has been found to be necessary. There were bills passed at the present session of Congress in both cases. This bill, I presume, could not be retroactive sufficiently to cover those cases, and I wanted to inquire if there was in the amendments the committee has reported anything that would cover cases of that kind, where the purchases have not been made and the buildings have not been commenced.

Mr. SPOONER. I will say to the Senator from New Jersey that *this bill will cover all cases where it is desirable to acquire land for public*

uses, no matter when the authority was conferred by Congress.

Mr. McPHERSON. This, then, is a general act?

Mr. SPOONER. *It is a general act.*

Mr. McPHERSON. *It will make unnecessary in the future any power of condemnation being specially provided in such bills.*

Mr. SPOONER. *Undoubtedly.*

The PRESIDENT *pro tempore*. The next amendment of the committee will be stated.

The CHIEF CLERK. It is proposed to add to the bill as a new section the following:

"SEC. 2. The practice, pleadings, forms, and mode of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms, and proceedings existing at the time in like causes in courts of record in the States within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

The amendment was agreed to.

Mr. SPOONER. To answer an inquiry which has just been addressed to me by the Senator from Nebraska (Mr. Manderson), and to bring the fact to the attention of other Senators, I will say that this bill is drawn so as to bring it within the scope of the decision of the Supreme Court of the United States in the case of Kohl and others *v.* The United States, found in 1 Otto, page 367.

The bill was reported to the Senate as amended, and the amendments were concurred in.

> The amendments were ordered to be engrossed, and the bill to be read a third time.
>
> The bill was read the third time, and passed.
>
> The title was amended so as to read: "A bill to authorize condemnation of land for sites of public buildings, and for other purposes."

Thus the history of the Act of 1888, as well as its broad language, shows that Congress intended that it should not be necessary thereafter to grant specific power to condemn property in addition to authority to acquire it; and there is nothing in the language of the statute of 1912 relating to the Hanson Canal which deprives the Secretary of War of this power to condemn property whose acquisition has been authorized by Congress.

The naming of a specific price at which the Secretary of War was authorized to procure the property did not preclude condemnation proceedings.

Reading the two acts together it is obvious that Congress intended to authorize the Secretary of War to procure the property at a voluntary sale if he could procure it for not more than sixty-five thousand dollars and in the alternative to procure it by condemnation proceedings. No inconsistency is shown in providing alternative methods of acquisition.

Nor is the naming of a definite price beyond which the Secretary of War might not go inconsistent with judicial power under condemnation proceedings. Of course, in the present case the question which the

company is attempting to raise is an abstract question, for the amount which the jury found to be due to the company was no greater than the amount which Congress had authorized the Secretary of War to pay as a maximum sum. But even if the contention of the company could not be thus answered it is clear that the fixing of a definite limit beyond which payment might not be made without further authority from Congress does not constitute an exercise by Congress of judicial power. Congress has simply limited the power of executive officers and not the power of courts and juries. Any amount which seems proper to the court and to the jury may be awarded in the condemnation proceeding, and the Government may not constitutionally take the property until payment of that award has been made or provided for. The decision of the court is unfettered and is binding upon the parties as to the extent of their respective rights.

Congress has simply said that the Secretary of War may procure the property at not more than a specified sum, or, in the alternative, may submit the question of the value of the property to judicial determination.

The question as to the value of the company's property was submitted to the jury and full power was given to them to find for the company in any amount. The court said (R. 163):

> Now you are not bound by the $65,000 that they agreed to; if you think they ought to get more than that, why you can award them

more than that. If you think they ought to get less than that, you can award them less. * * *

What you must endeavor to ascertain is the present actual damages that they would suffer, the damages, the compensation, that the Government ought to pay for the taking over of this canal to be used by the public in connection with themselves and everybody else. * * *

You must resolve the facts, find what they are, find the value and fix it.

The Circuit Court of Appeals said (R. 185):

The contention of plaintiff in error that the Act of 1912 undertakes to value such property so as to invade the judicial power can not be sustained.

It is true that it appropriates only a certain sum which the Secretary can expend without further appropriation. But as the court properly charged the jury this did not fix the value of the property sought to be condemned, and that they should find a greater or less sum as the evidence might satisfy them as to the value.

The Circuit Court of Appeals then quoted the following passage from the opinion in *Shoemaker* v. *United States*, 147 U. S. 282, 302:

The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands

and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate expenditure, can not be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. *It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to.*

JAMES M. BECK,
Solicitor General.

ROBERT P. REEDER,
Special Assistant to the Attorney General.

FEBRUARY, 1923.

O

Supreme Court of the United States.

OCTOBER TERM, 1922.

ALBERT HANSON LUMBER COMPANY, LTD.,
PLAINTIFF IN ERROR,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF FOR ALBERT HANSON LUMBER COMPANY, LTD., PLAINTIFF IN ERROR.

An alleged promise to convey cannot form an independent ground for condemnation, particularly where there is no legislative authority to acquire land other than by gift outside the limits of the Hanson Canal—Specification of Error, No. 2.

To support the verdict for the statutory price, opposing counsel lay stress upon the Company's resolutions of 1913. By its terms, it, and likewise the Government, recognized that the Act of 1912 made no provision for the acquisition of lands except by gift beyond the boundaries of the Canal; and it fur-

ther provides for "free access, ingress and egress to and from the said Hanson Canal, *through the lateral canals* now constructed and used by the Albert Hanson Lumber Company, Limited, in its timber operations and lumber business and for all such commercial purposes as the said lateral canals may be used for hereafter, even after the Hanson Canal shall have been converted into a public inland waterway," etc. And the uncontradicted testimony of Vice-President Lawless and Kemper in corroboration of the portion of the resolution proposing to convey or "donate" the 300-foot strip in consideration of widening the Canal, is, that there was a definite understanding with Col. Beach that the Canal be widened 100 feet and 9 feet depth (R., pp. 101, 102, 103, 104, 106, 107, Testimony of Kemper R., p. 74). Maj. Dent, Col. Beach's successor, testifies that he, acting for the Government, would not be bound by the foregoing understandings. Alarmed at what the Company considered a breach of faith and in an endeavor to save itself from the resulting and impending destruction of its entire business, the Company tried to obtain certain rights of way to build another Canal and which depended upon the outcome of a local election. Being defeated at that election, nothing was left but to resist these proceedings.

As the proceeding to condemn is an action at law, right or wrong, neither the Government nor the defendant ought to be permitted to stand on any equity, real or supposed, as authority to condemn lands outside the boundaries of the Hanson Canal. That the jury did not rest its verdict on the resolutions or negotiations is shown by the verdict itself,

which reserved none of the stipulations or benefits accruing to the Company under the resolutions. They found for the statutory price for the Canal and included the lands outside the Canal because the intracoastal waterway legislation provided for their being furnished free of cost to the United States. But whether, over our objections and motion to strike out, the jury resolved themselves into Chancellors by decreeing in effect a specific performance of the resolutions freed from its benefits accruing to the Company or rested their verdict on the statutory price notwithstanding the uncontradicted value or cost of reproduction of $152,000.00 of the Canal, has nothing to do with this proposition as to the authority to condemn these lands outside the limits of the Canal and which has been or seems to be industriously unnoticed by the opposition and by the lower courts, save in the first opinion of the Court of Appeals—For, pray, where and what is the authority to acquire these lands?

By its own pleading, the Government has judicially confessed that the exercise of the right to condemn the lands outside the forty-foot boundary of the Canal springs, *not from any Act of Congress,* but from an equity arising out of the Company's resolution or in the negotiations of purchase. And in the opinion of the Court of Appeals herein sought to be reversed, it starts out with the statement that the proceeding is "to condemn a described strip of land 300 feet wide which embraced a waterway known as the Hanson Canal." But this consists in the cumulation of two distinct causes of action, one grounded on the Act of 1912 as claimed authority to condemn the so-called Hanson Canal proper, the other ground-

ed either on an asserted agreement of purchase under the Company's resolution or some other Act of Congress (not shown) as claimed authority to condemn the Company's lands outside the boundaries of the Canal—Such are the distinct issues. The last opinion of the Court of Appeal, indeed the District Judge, confounds these issues on the assumption, *sub silentio,* that the authority to purchase the Hanson Canal carried with it an authority to condemn not merely the Hanson Canal but *in addition* the Company's lands beyond the limits of the waterway. Our motion to strike out (R., p. 9) and Bills of Exceptions Nos. 2, 3 and 6 (R., pp. 36, 38, 39, 40, 43, 45) covered the issue as to the Company's resolution as claimed authority for specific performance triable only in a Court of Equity and because this resolution could not operate as a ground for condemnation of lands outside the limits of the Canal.

As to any legislative authority for the condemnation of any lands outside the boundaries of the Canal, none has been or could legally be pointed out. To the contrary, as argued in our original brief at pages 51 to 58, *these lands were not to be paid for by the United States,* and as the exercise of the power to condemn necessarily implies just compensation to be paid the owner, and as this acquisition by donation or free of cost to the United States depended upon a voluntary act of the owner or some one other than the United States, and as the authority to condemn even under the Act of Aug. 1888, is dependent upon an authority to procure, the Secretary of War was authorized neither to procure nor to condemn in the manner attempted. And finally, if it could be said that an authority to accept a gift, or to acquire

free of cost to the United States, constitutes an authority to procure then, reading the Acts of 1907, 1909, 1911, 1912, and the House Documents made part of them together as laws in *pari materia*, you get a legislative declaration of a rule for computing the compensation in that the judiciary must not take into account the value of lands outside the Canal limits which may be required for widening to the extent of 260 feet by 4 miles, although nothing is said in the Act of 1912 about widening, and thus the case is brought squarely within the interdiction announced in Monongahela Nav. Co. vs. United States, 148 U. S., p. 327 and kindred decisions therein approved. In addition to the cases cited in our original brief, the following decisions of the lower Federal courts are in accord with this Specification of Error No. 2.

In re Montgomery 48 Fed. Rep., 896; *In re* Manderson 51 Fed. Rep., 501, 2 C. C. A., 490; United States vs. Rauers 70 Fed. Rep., 748; United States vs. Certain Lands 70 Fed. Rep., 940—all holding that the Act of Aug. 1, 1888, has no application to special legislation authorizing the acquisition of real estate by gift or free of cost to the United States.

Views of members of a legislative body expressed in debate are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.

It is said the history of the Act of 1888 shows that Congress intended full effect should be given to its sweeping terms (opposing brief, pp. 13 to 18). Whilst its history from introduction to final passage may be an aid to construction, the views of

members expressed in debate or on the floor, or the motives of individual members in voting for or against it, are not. This rule and the reason for it is shown by United States vs. Trans-Missouri Freight Asso. 166 U. S. at page 318 and cases there cited. So the discussion referred to in opposing brief is out of place. However, we concede that the history shown covers the acquisition of lands for public uses and we are therefore constrained to abandon the point on the application of the *ejusdun generis* rule contained in our original brief on page 28 to the middle of page 29, but no further.

United States vs. Graham & Irvine, 250 Fed., 499, 510, 502, and United States vs. Beatty, 198 Fed., 284, cited by opponents, are not opposed to but confirm our position on Specification of Error, No. 1.

In quoting the first two sentences from page 502 of U. S. vs. Graham & Irvine, 250 Fed., 499, 502, on page 13 of opposing brief, counsel omitted to quote the remaining three sentences of the paragraph which undoubtedly qualifies what precedes, thus:

> "And indeed, because of the provisions of the Act of 1888, it seems to me impossible to hold that the Act of 1911 shows an implied intent to repeal the Act of 1888 as to lands to be acquired under the Act of 1911. If such intent had existed, no such words as 'acquirement' and 'acquisition' would have been used in the Act of 1911. *On the other hand, the language would have been 'purchase by voluntary sale,' or words of similar import.*"

In United States vs. Beatty, 198 Fed., 284, where

the words of the statute were "for the purchase of land" and nothing more, opposing counsel again on page 12 of their brief omit quoting from the entire paragraph, for Judge McDowell seems to concur in our view, thusly:

> "To construe the word (purchase) here to mean only acquisition by buying, we must assume that Congress had in mind the method of acquisition rather than the general purpose to acquire."

In these two cases relied on by opponents, the context forbade a construction of the word "purchase" to mean a contract of purchase but indicated a technical purchase, including any method of acquisition other than by descent. In the Act of 1912, all the essentials of a contract of purchase or purchase by voluntary sale at a fixed price being present, the technical meaning is rejected and the exclusive method prescribed obtains.

Shoemaker vs. United States, 147 U. S., 282, 302, distinguished under Specification of Error No. 1.

In the Shoemaker case, there were 84 separate parcels of land belonging to 84 different owners, the aggregate amount to be expended in the purchase of land for the park being limited to $1,200,000. This limitation, is was said, "cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property." There, no particular piece of the 84 parcels of land was

selected by Congress to be purchased or condemned at a given sum, and so the aggregate appropriation for the 84 parcels did not fix the value for any one of them. But here, Congress, and not the Secretary of War, has selected a solitary inseparable waterway belonging to a single proprietor, to be acquired at not less than a fixed sum. So, assuming, *arguendo,* the application of the Act of 1888 to navigable waterways which we deny, the price limitation is necessarily attached to the alleged alternative method, for why did Congress fix a price or value if it had an intention of acquiring by any method at any price. Had the Jury ignored the price so fixed and found for the undisputed *real* value of $152,000, the faith and purse of the Government not being pledged to pay the award, the cloud thus resting on the Company's title combined with a precarious possession under such a decree, would be tantamount to confiscation and untold damage and injury, until and unless Congress deemed it fit to alter its original intention by special act. So we get back to the proposition that the Act of 1888 applies to cases where by special legislation Congress had in mind no price limitation for acquiring a particular undivided piece of real estate for a public use. On the other hand, the delegated powers to the officer can only be in execution of an Act of Congress. The whole legislation discloses no intention on the part of Congress to authorize condemnation, for even "an act done under color of authority and ostensibly in the exercise of discretion may be so clearly in excess of authority, or in abuse of authority as to require the courts to declare it to be such and therefore of no

effect." See Sutton vs. United States, 256, U. S., 575. Church of Holy Trinity v. U.S. 143 U.S. 457.

Respectfully submitted,

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